Supreme Court, U. S.
FILED
MAY 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1974
No. 73-5845

CATHERINE JACKSON,
On Behalf of Herself and All Others Similarly Situated,
Petitioner,

vs.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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SUBJECT INDEX

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED	2
SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. Petitioner's complaint fails to state a cause of action upon which relief may be granted because the termination of service to which her complaint is directed was not of service to her	5
II. In adopting and filing with the Pennsylvania Public Utility Commission its general rules and regulations and in administering such general rules and regulations, Respondent did not "act under color of state law"	11
A. The furnishing of electric service is not, and has never been a function performed by the Commonwealth of Pennsylvania for all of its residents	11
B. The fact that Respondent's activities benefit its customers and are subject to regulation does not convert such activities into State action	14
C. The fact that Respondent has a substantial monopoly of electric service within its service area and operates as a public utility under the authority of the Pennsylvania Public Utility Law does not convert its acts into the acts of the Commonwealth unless and until such acts are specifically authorized or approved by a Commonwealth agency.	14
D. The fact that Respondent's activities are subject to extensive regulation under Federal statutes and by Federal agencies is incompatible with the concept that its status as a public utility subject to regulation by the Commonwealth makes its acts those of the Commonwealth.	16

PAGE

E. The rules and regulations of Respondent and its administration thereof do not constitute the effectuation by the Commonwealth, directly or indirectly, of State policies which are repugnant to the United States Constitution. 18

F. The fact that Respondent's revenues are subject to taxation by the State and local subdivisions thereof does not bring Respondent's actions within the ambit of the Fourteenth Amendment. 26

G. Since Respondent did not employ facilities or authority of the Commonwealth to effect the termination of service, the manner of such termination is not central to a finding that the termination did not involve action under color of State law 26

H. The practical consequence of acceptance of Petitioner's position would be to deprive Respondent of property without due process of law in violation of the Fifth Amendment 27

CONCLUSION 29

TABLE OF AUTHORITIES CITED

CASES: PAGE

Baily v. *Philadelphia*, 184 Pa. 594, 39 A. 494 (1898) 13

Bronson v. *Consolidated Edison Co.*, 350 F. Supp. 443 (S.D.N.Y. 1972) 6

Burton v. *Wilmington Parking Authority*, 365 U.S. 719 (1961) 18

Cooper v. *Aaron*, 358 U.S. 1 (1958) 13

DeFunis v. *Odegaard*, 42 U.S.L.W. 4578 (U.S. April 23, 1974) 8

District of Columbia v. *Carter*, 409 U.S. 418 (1973) 11, 19

Evans v. *Newton*, 382 U.S. 296 (1966) 13, 18

Food Employees Local 590 v. *Logan Valley Plaza*, 391 U.S. 308 (1968) 13

PAGE

Fuentes v. *Shevin*, 407 U.S. 67 (1972) 27

Girard Life Insurance Co. v. *The City of Philadelphia*, 88 Pa. 393 (1879) 13, 16

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 10, 29

Hattell v. *Public Service Co.*, 350 F. Supp. 240 (D. Colo. 1972) 6

Helvering v. *Gowran*, 302 U.S. 238, rehearing denied, 302 U.S. 781 (1937) 7

Helvering v. *Rankin*, 295 U.S. 123 (1935) 7

Ihrke v. *Northern States Power Co.*, 459 F. 2d 566 (8th Cir.), vacated as moot, 409 U.S. 815 (1972) 6, 26

Jackson v. *Metropolitan Edison Co.*, 483 F. 2d 754 (3rd Cir. 1973) 6

Kadlec v. *Illinois Bell Telephone Co.*, 407 F. 2d 624 (7th Cir. 1969), cert. denied, 409 U.S. 1114 (1973) 6

Langnes v. *Green*, 282 U.S. 531 (1931) 7

Lombard v. *Louisiana*, 373 U.S. 267 (1963) 18

Lucas v. *Wisconsin Electric Power Co.*, 466 F. 2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973) 6

Marsh v. *Alabama*, 326 U.S. 501 (1946) 13

Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972) 8, 13, 15, 19, 26

Monroe v. *Pape*, 365 U.S. 167 (1961) 19

Morley Construction Co. v. *Maryland Casualty Co.*, 300 U.S. 185, rehearing denied, 300 U.S. 687 (1937) 7

Nixon v. *Condon*, 286 U.S. 73 (1932) 13

Otter Tail Power Co. v. *United States*, 409 U.S. 820 (1973) 17

Palmer v. *Columbia Gas of Ohio, Inc.*, 479 F. 2d 153 (6th Cir. 1973) 6, 28

Peterson v. *City of Greenville*, 373 U.S. 244 (1963) 18

Public Utilities Commission v. *Pollak*, 343 U.S. 451 (1952) 15, 25

Reitman v. *Mulkey*, 387 U.S. 369 (1967) 18

Robinson v. *Florida*, 387 U.S. 153 (1967)..... 18

PAGE

Salisbury v. *Southern New England Telephone Co.*, 365 F. Supp. 1023 (D. Conn. 1973) 6

Smith v. *Allwright*, 321 U.S. 649 (1944) 13

Stanford v. *Gas Service Co.*, 346 F. Supp. 717 (D. Kan. 1972) 6

Terry v. *Adams*, 345 U.S. 461 (1953) 13

United States v. *American Railway Express Co.*, 265 U.S. 425 (1924) 7

United States v. *Price*, 383 U.S. 787 (1966) 6

CONSTITUTION OF THE UNITED STATES:

Fourteenth Amendment 6, 14, 26

Fifth Amendment 27

CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA OF 1790:

Art. 7, § 1 (53 P.S. § 47471) 13

STATUTES:

Federal Statutes

42 U.S.C. § 1983 ..... 2, 6, 17, 18, 22

Federal Power Act

16 U.S.C. § 824(a) et seq. 16, 17

16 U.S.C. § 824(f) 17

Klu Klux Klan Act of 1871

§ 1, Act of April 20, 1871, 17 Stat. 13 19

Public Utility Holding Company Act of 1935

15 U.S.C. § 79 et seq. 17

15 U.S.C. § 79b(c) 17

Sherman Act

15 U.S.C. § 2 17

Pennsylvania Statutes

Corporation Act of 1874

15 P.S. § 3001 12

15 P.S. § 3014 12

Public Company Service Law

Law of 1913, July 26, P.L. 1374 12

PAGE

Third Class City Code
53 P.S. § 38575 12

Public Utility Law
66 P.S.
§ 1122 21
§ 1142 21
§ 1144 21
§ 1171 20
§ 1172 21
§ 1182 22
§ 1183 21
§ 1341 22
§ 1342 22

REGULATIONS:

Public Utility Commission Regulations
P.U.C. Electric Regulations
Rule 14D 27
P.U.C. Tariff Regulations
Section VIII 22, 23

MISCELLANEOUS:

Law Review Articles
"Constitutional Safeguards for Public Utility Customers: Power to the People", 48 N.Y. U.L. Rev. 493 (1973) 7
"Fourteenth Amendment Due Process in Terminations of Utility Service for Non-Payment", 86 Harv. L. Rev. 1477 (1973) 7, 28
"Public Utilities and the Poor", 78 Yale L. J. 48 (1969) 7
Shelton, "Shutoff of Utility Services for Non-Payment; a Plight of the Poor", 46 Wash. L. Rev. 745 (1971) 7

Metropolitan Edison Company Electric Tariff
Electric Pa. P.U.C. No. 40 24
Electric Pa. P.U.C. No. 41 ..... 24, 25

Newspaper Article
New York *Daily News*
May 22, 1974, page 30 28

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether a complaint which seeks to enjoin the termination by Respondent of electric service to premises owned by the complainant fails to state a cause of action under 42 U.S.C. § 1983 when Respondent's customer was another person (not related to complainant) who had not paid previous bills for service and who no longer occupied such premises.

II. Whether the termination of electric service by an investor-owned electric utility pursuant to its own rules and without express authorization by any State agency constitutes action taken under color of State law for the purposes of the Fourteenth Amendment and 42 U.S.C. § 1983.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

In two respects, it is necessary to supplement Petitioner's statement of the case:

1. Petitioner states that she has been a "a residential utility customer of Respondent Metropolitan Edison Company since March 1969 * * *".

The record shows that Petitioner testified that she was a customer of Respondent from March 1969 until September 22, 1970, when "the electric was disconnected in my name" (App. 22-23); that, on September 22, 1970, she went out to make a telephone call to Respondent to inquire about the disconnection and had been advised that service had been disconnected for non-payment (App. 24); that when she returned, 45 minutes later (App. 31), the electricity had been turned back on and that thereafter bills for service "started coming in James Dodson's name" (App. 23-24);

that she had no knowledge of whether the bills in the name of Dodson were ever paid (App. 24) but that she assumed that he had made such payments (App. 32); that Dodson had resided in Petitioner's house from March 1969 until August 1971 but was neither a co-owner or tenant (App. 26); that, during the period September 22, 1970 through October 11, 1971, Respondent had not paid any bill for electricity consumed in her home (App. 29); that, on October 6, 1971 she advised Respondent's representative who was seeking Dodson that Dodson "didn't live there any more" (App. 25); that, on October 7, 1971, another representative of Respondent advised her that somebody had "crossed some kind of line" (App. 27) but she had no knowledge that this had occurred (App. 27) and that "he would have to go back to the company and find out just what was going on and just what was what" (App. 27); that, in that same conversation with Respondent's representative, she had stated that service should be "put in the name of a Robert Jackson", who was her 12-year-old son (App. 29-30) and that electric service to her residence had been terminated on October 11, 1971 (App. 26).

2. Petitioner testified that she had received no written or oral notice prior to the October 11, 1971 termination of service. The District Court made no finding as to whether or not notice had been given. However, as the Court of Appeals observed, Respondent's tariff provides, in fact, that "reasonable notice must be given before termination", so that no issue is presented to this Court concerning a customer's right to reasonable prior notice.

SUMMARY OF ARGUMENT

I. Although the point was not raised below in support of Respondent's motion to dismiss Petitioner's complaint for failure to state a cause of action as to which relief can be granted, Respondent wishes to note that the service, the

termination (for nonpayment) of which Petitioner seeks to prevent, was not being rendered to her and had not been rendered to her for more than a year. Even assuming that the Fourteenth Amendment requires that an investor-owned electric company must afford a customer opportunity for a hearing prior to the termination of service, Respondent would not be required to afford Petitioner a hearing because Respondent's customer was a person unrelated to Petitioner who occupied the same premises. It was that individual to whom the unpaid bills were sent, Petitioner not being on Respondent's customer list and even now denying liability therefor. Because she was not Respondent's customer, Petitioner has failed to state a cause of action in alleging that Respondent proposes to terminate electric service to her premises.

II. In terminating electric service, Respondent did not act under color of State law. Respondent is an investor-owned electric utility supplying electric service in parts of Pennsylvania, a service which has never been performed by the Commonwealth for all of its residents. Respondent is subject to regulation by the Pennsylvania Public Utility Commission. But the fact that Respondent's services are beneficial to society is not sufficient to characterize the performance of those services as the carrying on of a state function. To do so would obliterate the fundamental difference between State and private action envisioned by the Fourteenth Amendment. (Similarly the fact that Respondent is subject to taxation by the Commonwealth does not transform Respondent into a "partner" of the Commonwealth or impute Respondent's acts to the Commonwealth.)

Nor does Respondent's substantial monopoly position or its operation under the supervision of the Pennsylvania Public Utility Commission convert its acts into the acts of the Commonwealth. Such a conversion requires the

explicit authorization or approval of the Public Utility Commission of the acts contemplated and no such specific authorization or approval was granted. Furthermore, the pattern of Federal regulation to which Respondent is subject—which pattern exempts activities of States and their agencies—is clearly incompatible with the notion that the acts of Respondent constitute the acts of the Commonwealth.

Neither do Respondent's rules and regulations constitute the effectuation by the Commonwealth of a state policy repugnant to the Constitution, for Respondent's policies and practices with respect to termination of service are not encouraged by the State. Indeed, the State has evidenced no interest in their formulation or execution.

Acceptance of Petitioner's claim for relief would effectively constitute a taking of Respondent's property in violation of the Fifth Amendment of the Constitution. Requiring Respondent to continue to furnish electric service to customers without reasonable assurance of payment would result in Respondent's being forced to provide such service without being compensated therefor and in its being deprived of property without due process of law.

ARGUMENT

I. Petitioner's complaint fails to state a cause of action upon which relief may be granted because termination of service to which her complaint is directed was not service to her.

This case is one of many in which plaintiffs have sought to establish that the termination of the service rendered by electric, gas and telephone utilities, without prior hearing, violates the Fourteenth Amendment of the United

States Constitution[1] and 42 U.S.C. §1983.[2] Such claims have been passed upon, with conflicting results, by United States District Courts in Districts in Colorado[3], Connecticut[4], Kansas[5], and New York[6], and by United States Courts of Appeals in the Third[7], Sixth[8], Seventh[9], and Eighth[10], Circuits; similar claims are pending in other courts.

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[1] Section 1 of the Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." The "under color of" state law requirement of 42 U.S.C. § 1983 and the "state action" requirement of the Fourteenth Amendment have been construed to be of the same breadth and scope. *United States* v. *Price*, 383 U.S. 787, 794 n. 7 (1965).

[3] *Hattell* v. *Public Service Co.*, 350 F.Supp. 240 (D. Colo. 1972).

[4] *Salisbury* v. *Southern New England Telephone Co.*, 365 F.Supp. 1023 (D. Conn. 1973).

[5] *Stanford* v. *Gas Service Co.*, 346 F.Supp. 717 (D. Kans. 1972).

[6] *Bronson* v. *Consolidated Edison Co.*, 350 F.Supp. 443 (S.D. N.Y. 1972).

[7] *Jackson* v. *Metropolitan Edison Co.*, 483 F.2d 754 (3rd Cir. 1973).

[8] *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973).

[9] *Kadlec* v. *Illinois Bell Telephone Co.*, 407 F.2d 624 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969); *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

[10] *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir.), vacated as moot, 409 U.S. 815 (1972); *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973).

In view of the extensive litigation with respect to this issue, and the attention it has received from legal commentators[11], it is with some diffidence that Respondent brings to the attention of the Court its view that the termination of electric service to which Petitioner's complaint is addressed could not have deprived her of any Constitutionally-protected right since that termination was not of service to her.

Although Respondent did not rely on this ground in support of its motion before the District Court to dismiss the complaint for failure to state a cause of action, it is well settled that, if the result below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. *Helvering v. Gowran,* 302 U.S. 238, 245, rehearing denied, 302 U.S. 781 (1937); *Helvering v. Rankin,* 295 U.S. 123, 132-33 (1935).

If an issue has been properly raised in the court or courts below (and Respondent in this case has raised the Petitioner's failure to state a cause of action in its motion to dismiss), an appellee may, without taking a cross appeal, urge in support of the judgment below any matter appearing in the record even though such matter was overlooked or ignored by the court below, so long as the appellee does not seek to enlarge his own rights or lessen the rights of his adversary under the decree. *Morley Construction Co. v. Maryland Casualty Co.,* 300 U.S. 185, 191, rehearing denied, 300 U.S. 687 (1937); *Langnes v. Green,* 282 U.S. 531, 535 et. seq. (1931); *United States* v. *American Railway Express Co.,* 265 U.S. 425, 435 (1924). (Since the decree below merely granted Respondent's motion and dismissed Petitioner's complaint, there is no question of enlarging Respondent's

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[11] See, for example, Shelton, "Shutoff of Utility Services for Non-Payment; A Plight of the Poor", 46 Wash. L. Rev. 745 (1971); "Constitutional Safeguards for Public Utility Customers: Power to the People", 48 N. Y. U. L. Rev. 493 (1973); "Fourteenth Amendment Due Process in Terminations of Utility Service for Non-Payment", 86 Harv. L. Rev. 1477 (1973); "Public Utilities and the Poor", 78 Yale L. J. 48 (1969).

rights or lessening Petitioner's rights under the decree.) In the light of the recent decisions of the Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) and *DeFunis v. Odegaard*, 42 U.S. L.W. 4578 (U.S. April 23, 1974), which, in effect, caution against the rush to reach Constitutional confrontations not necessarily involved by the facts of the particular case presented to the Court, Respondent feels compelled to note its view that, no matter how broadly one construes "property interests" and "state action", Petitioner's complaint and testimony demonstrate that she had no Constitutionally-protected right to receive electric service from Respondent.

By her own testimony Petitioner had ceased to be a customer of Respondent on September 22, 1970.[12] At that time she was delinquent in the payment of bills for service, and she has never cured that delinquency. Thereafter, although Respondent furnished electric service to the premises owned by Petitioner for an additional 13 months and the meters with respect to such service were read regularly, Respondent's customer was James Dodson who resided in Petitioner's home until August 1971, and Petitioner acquiesced in the substitution of Dodson for herself as Respondent's customer. Petitioner knew that Respondent's bills were rendered to Dodson and not to herself and she had no knowledge as to whether such bills were ever paid by Dodson. Although Dodson ceased to reside in Petitioner's house in August 1971, she made no effort to establish service in her own name. Indeed, when Respondent's representative came to her house on October 6, 1971 inquiring for Dodson, she stated that service should be "put in the name of Robert Jackson", her 12-year-old son.

Pending the outcome of these proceedings, Respondent is furnishing electric services to the premises, pursuant to the

[12] Petitioner's complaint in the District Court (App. 9) and brief in this Court (Pet. Br. 4) make clear that Petitioner's complaint was directed to the October 11, 1971 termination and not to the September 22, 1970 termination.

terms of a temporary restraining order of the District Court (App. 13) and of an Order of the District Court continuing the temporary restraining order (App. 75). Respondent has not billed Petitioner for service rendered under such orders and Petitioner has not paid for such service.

Petitioner's own complaint contains an implicit disavowal that *she* was a customer of Respondent for a period of a year prior to the allegedly wrongful termination of service on October 11, 1971, to which her complaint is addressed, for her complaint states in paragraph 9 that:

> "The billing party or person responsible for said bill, since on or about October 1970, has been and is one James Dodson, a former co-occupant with Plaintiff, of the above premises."

In her statement of questions presented and frequently throughout her brief, Petitioner refers to non-payment of a "disputed bill" (e.g., Pet. Br. 3, 4, 7), but the record does not disclose that she was disputing her own unpaid bill for service rendered prior to September 22, 1970. Similarly, while in her complaint she states that she has "an adequate defense to her alleged liability of the utility bill" (App. 10), the only defense to such liability which she presented was that Dodson "had assumed full liability for such payment".[13]

Accepting, *arguendo,* Petitioner's contention that the termination of electric service to a customer by an investor-owned utility without prior opportunity for a hearing is within the Constitutional proscription of the Fourteenth Amendment and 42 U.S.C. § 1983 it is Dodson—and not Petitioner—whose rights have been denied, and it is Dodson —not Petitioner—who can assert a claim of such denial. As Petitioner's complaint disavows responsibility for payment

[13] In her brief in this Court, Petitioner states that Dodson "had assumed full responsibility for payment" (Pet. Br. 4).

of Respondent's bills to Dodson, Petitioner is compelled to assert in substance that it is the premises that she owns that are entitled to electric service from Respondent. But the protection of the Fourteenth Amendment applies to "persons" and not "premises".

Nor can Petitioner successfully contend that she became Respondent's customer on October 7, 1971, after Respondent learned the previous day that Dodson no longer resided in the premises. Instead, Petitioner's own testimony on that score is that Respondent's representative stated that he would have to go back to the Company and find out what was going on and that she had told him that electric service should be put in the name of Robert Jackson, her 12-year-old son. There is no evidence that she had requested that service be furnished to her or that either she or her 12-year-old son had in fact been accepted by Respondent as Respondent's customer.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court held that a State may not, without prior hearing, terminate the payment of welfare benefits to one who has been receiving such payments. It did not there hold that a State is compelled to initiate such payments before being satisfied that the claimant is entitled to receive them and Justice Black, in dissent, urged that one consequence of the majority's holding was that, in order to protect itself against improper claims, a State would be likely to be more rigorous in its investigations before initiating such payments. *Id.* at 278-79. If a State is not constitutionally compelled to initiate welfare payments to a claimant before being satisfied that the claimant is entitled to such payments, it is difficult to believe that an investor-owned electric utility is constitutionally compelled to furnish electric service to a potential applicant for such service (let alone to her minor son) who has not complied with Respondent's regulations relating to the initiation of such service, merely because she is seeking such service for the same premises as those previously also

occupied by another (delinquent) customer to whom service was previously rendered by the utility.

Petitioner's complaint was filed not only on her own behalf but also as a class action. By reason of the fact that she was not, and for more than a year had not been, a customer of Respondent, it may be doubted whether, if the issue had been presented to the District Court for decision, that Court would have found Petitioner to be an adequate representative of the alleged class. But that matter is not before this Court. The District Court never made a class action determination. Consequently, Petitioner's own lack of any Constitutionally-protected interest with its attendant lack of jurisdiction cannot be cured on this review by the class action allegations which were not decided by the Courts below.

II. In adopting and filing with the Pennsylvania Public Utility Commission its general rules and regulations and in administering such general rules and regulations, Respondent did not "act under color of state law".

A. *The furnishing of electric service is not, and has never been, a function performed by the Commonwealth of Pennsylvania for all of its residents.*

It has been repeatedly held that the commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority, that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful", and that the reach of 42 U.S.C. § 1983 is of similarly limited scope. *District of Columbia v. Carter,* 409 U.S. 418, 423-24 (1973). In apparent deference to its recognition of this well-established proposition, Petitioner first characterizes the role performed by Respondent as the discharge of a "public function", then equates the discharge of "public functions"

to "State action", and finally concludes therefrom that the acts of Respondent are the acts of the Commonwealth. But this proposition does not withstand analysis.

There is no question that Respondent discharges a function which is subject to licensing, regulation and other control by the State and which, in many contexts, can accurately be described as "public functions". So, too, are the functions performed by innkeepers, grain storage elevators, warehousemen and many other forms of economic activity. But the fact that the State has the power to license and regulate the acts of a private person does not convert such acts to State action. In conducting its business, Respondent is not discharging a function that has ever been a function of the Commonwealth of Pennsylvania.

Respondent and its predecessors were organized under the provisions of the Corporation Act of 1874[14], which antedated by almost a half century the enactment in 1913 of the first comprehensive public utility regulatory statute, the Pennsylvania Public Service Company Law.[15] When Respondent and its predecessors were organized, the great majority of the residents of the Commonwealth did not receive electric service. Indeed, throughout the Nation, the history of electric service has been one of the gradual extension of electric service from urban clusters to more remote areas as population has grown and technology has changed. Even today, there are a relatively few residents of the Commonwealth who do not receive electric service and the Commonwealth has not assumed any responsibility to provide such service to them. Thus, in the supply of electric service, Respondent has not assumed a responsibility of the Commonwealth and is not acting for the Commonwealth in furnishing such service.

The fact that some boroughs in Pennsylvania have elected to undertake the distribution of electric service pursuant to Pennsylvania Third Class City Code (53 P.S. § 38575) does

[14] 15 P.S. §§ 3001, 3014.

[15] Act 1913, July 26, P.L. 1374.

not elevate the furnishing of electric service to a State function. Instead, it reinforces the proposition that the Commonwealth has not undertaken responsibility for the furnishing of electric service to all its residents, that it merely permits its boroughs to assume such responsibility if their local officials and electorates wish them to do so. But functions performed by private parties do not become State functions because they are occasionally performed by States or local municipal bodies.

Almost a century ago, the Pennsylvania Supreme Court rejected the argument that the furnishing of water and gas constituted a State function. *Girard Life Insurance Co. v. The City of Philadelphia,* 88 Pa. 393 (1879). This view was reiterated by the Pennsylvania Supreme Court in *Baily v. Philadelphia,* 184 Pa. 594, 39 A. 494 (1898), in which the Court held that even the furnishing of street lighting was not a municipal duty.[16]

By contrast, there are functions which, by tradition, the State constitution or State legislation are State functions. Among those are the furnishing of free education[17], police protection, the conduct of elections, etc. When the State delegates the performance of such functions to a private party, the action of the private party in conducting such functions is state action, as the Court held in *Food Employees Local 590 v. Logan Valley Plaza,* 391 U.S. 308 (1968), *Evans v. Newton,* 382 U.S. 296 (1966), *Cooper v. Aaron,* 358 U.S. 1 (1958), *Terry v. Adams,* 345 U.S. 461 (1953), *Marsh v. Alabama,* 326 U.S. 501 (1946), *Smith v. Allwright,* 321 U.S. 649 (1944) and *Nixon v. Condon,* 286 U.S. 73 (1932).

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[16] *Cf. Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 175 where in support of the position that a private corporation does not act under color of State law merely because it may be the beneficiary of State supplied services such as police and fire protection, or the providing of water or electricity, the Court states that such a holding would "utterly emasculate the distinction between private and state conduct".

[17] This has been required by the Pennsylvania Constitution since 1790. See Pa. Const. of 1790, art. 7, § 1 (53 P.S. § 47471).

B. *The fact that Respondent's activities benefit its customers and are subject to regulation does not convert such activities into State action.*

It has been suggested that where "significant state interests are promoted through particular conduct, then the ostensibly private party comes under color of law and within the ambit of the Fourteenth Amendment" (Brief for the Legal Aid Foundation of Long Beach et al. as Amicus Curiae at 21). The test proposed is an appealing one but, if accepted, would bring within the ambit of the Fourteenth Amendment a whole variety of actions universally considered to be without it. For example, assuming the promotion of the public health to be a "significant state interest," would not the application of this formula mean that doctors, because of their being permitted to practice solely by virtue of being licensed from the State, be subjected to precisely the same restraints on billing and termination of services as amici propose for electric utilities? Would not the same be true of optometrists and hairdressers? Again, would not laws regulating the ingredients of food items bring all vendors of such products "within the ambit of the Fourteenth Amendment"? Any licensing or regulatory system is predicated upon the concept that the public interest is affected by the acts of those subject to such licensing or regulation. At issue is whether the promotion of "significant state interest" by the grant of a license or imposition of regulation automatically subjects individuals so licensed or regulated to restrictions similar to those placed upon State government itself. We submit that such a result effectively destroys the distinction between private and public action which has been fundamental to the operation of the Fourteenth Amendment since its adoption. For that reason amici's test must be rejected.

C. *The fact that Respondent has a substantial monopoly of electric service within its service area and operates as a public utility under the authority of the Pennsylvania Public Utility Law does not convert its acts into the acts of*

the Commonwealth unless and until such acts are specifically authorized or approved by a Commonwealth agency.

Petitioner has stated as fact that Respondent is a "state sanctioned monopoly" (e.g. Pet. Br. 7, 13), possesses an "exclusive franchise" (e.g. Pet. Br. 7) or "exclusive territory" (e.g. Pet. Br. 24) and enjoys a "guaranteed fair rate of return" (e.g. Pet. Br. 24). Respondent might well appreciate these attributes if they were true, but they are not. While Respondent does, in fact, have a substantial monopoly in its service area, Respondent's certificate of public convenience does not give it the exclusive right to furnish electric service in its service area. In certain parts of its service area another investor-owned utility also has a certificate of public convenience to furnish service and customers have from time to time elected to change their supplier of electric service.

Furthermore several boroughs within Respondent's service area themselves furnish electrical service to their residents, and a rural electric cooperative does the same for its members. Petitioner's own City of York could itself compete with Petitioner by purchasing electricity at wholesale and retailing it to its residents.

Thus the Respondent does not exercise a State-granted exclusive monopoly as Petitioner alleges. Moreover, the fact that a public utility possesses a substantial monopoly pursuant to governmental authorization does not in and of itself make the acts of the public utility those of the government. *Public Utilities Commission v. Pollak,* 343 U.S. 451, 462 (1952). Nor is the mere existence of authority to regulate sufficient to convert private action to State action. There must be a closer nexus; the act complained of must have been specifically authorized in some fashion by the State agency. *Public Utilities Commission v. Pollak, supra; Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972).

State regulation does not, of course, provide a "guaranteed fair rate of return" as alleged by Petitioner. One

need only look at the history of railroads and street railways to discern that rate regulation provides no such umbrella. Indeed, under the inflationary conditions existing during the past several years, Respondent, like many other electric utilities, has been unable to earn a fair rate of return, largely by reason of the inhibitions of the rate regulatory process on its attempts to price its service on a compensatory basis.

In our view, the decision of the Pennsylvania Supreme Court in the *Girard Life* case[18] demonstrated astounding foresight in recognizing, in 1879, that a municipality could not arbitrarily discontinue water or gas service to one to whom it had previously furnished such service, not because the furnishing of such service was a municipal function but because it would be a State agency (i.e., municipality) that was acting arbitrarily in so doing, even though the service that it had provided was not a state function.[19]

D. *The fact that Respondent's activities are subject to extensive regulation under Federal statutes and by Federal agencies is incompatible with the concept that its status as a public utility subject to regulation by the Commonwealth makes its acts those of the Commonwealth.*

A catalogue of the Federal statutes, regulations and agencies to which Respondent is subject would be almost endless. For example, it is subject to regulation by the Federal Power Commission under Parts II and III of the Fed-

[18] 88 Pa. 393 (1879).

[19] Plaintiff puts great stress on electricity being a necessity of life. If she is thereby suggesting that the right to receive electrical service should constitute a property right or a privilege of the citizens of the United States, she should deal with the ancillary questions of whether providing such service may be conditioned upon payment therefor. If her argument that the providing of electricity constitutes a 'public function' means only that its provision by governmental entities has been so commonplace that it has taken on the coloration of a right or privilege, experience of the past eighty years, during which the overwhelming proportion of electric service has been provided by investor-owned companies, is sufficient disproof.

eral Power Act[20] and, as a subsidiary of a registered public utility holding company, by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935.[21] Both of these statutes are not applicable to States or State agencies.[22] If, as Petitioner contends, action by the Commonwealth in granting of certificates of public convenience to Respondent and subjecting it to comprehensive regulatory authority makes Respondent's acts those of the State, then the same reasoning should make Respondent an agency of the Commonwealth for purposes of exemption from Parts II and III of the Federal Power Act and the Public Utility Holding Company Act of 1935—which is clearly not the case.

In *Otter Tail Power Company v. United States*, 409 U.S. 820 (1973), the Court held that an electric utility company was in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). Since the Sherman Act does not apply to States and State agencies, that holding cannot be reconciled with Petitioner's argument that all acts of a public utility which possesses State-granted franchise rights and is subject to comprehensive regulation by a State agency are ipso facto the acts of a State.

The "sifting of facts and weighing of circumstances" approach employed by the Court for in applying 42 U.S.C. § 1983 obviously means that a meat axe cannot be employed as Petitioner would have the Court do. What is required is careful diagnosis and the use of a surgeon's skill and scalpel

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[20] 16 U.S.C. § 824(a) et seq.

[21] 15 U.S.C. § 79 et seq.

[22] Section 201(f) of the Federal Power Act (16 U.S.C. § 824(f)) provides in pertinent part:

> "No provision in [this Part] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

Section 2(c) of the Public Utility Holding Company Act (15 U.S.C. § 79b(c)) is essentially similar.

to lay bare whether a particular act is designed to effectuate a State policy repugnant to the Fourteenth Amendment or is otherwise pursuant to clear State authorization.

E. *The rules and regulations of Respondent and its administration thereof do not constitute the effectuation by the Commonwealth, directly or indirectly, of State policies which are repugnant to the United States Constitution.*

Most of the cases presenting "State action" issues to this Court have represented attempts to perpetuate, through purportedly private instrumentalities, the prior racial discriminatory State policies which were the cause of adoption of the Fourteenth Amendment to the Constitution.

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) involved the use of restaurant facilities owned by a State agency and leased to an allegedly private entity—but on terms which made the State agency a joint participant with the private entity—to discriminate against customers on the grounds of race. *Peterson v. City of Greenville,* 373 U.S. 244 (1963), involved segregation by a private entity at its lunch counter pursuant to local city ordinances requiring the separation of races in restaurants. *Lombard v. Louisiana,* 373 U.S. 267 (1963) involved racial segregation by a private entity where public statements by the Superintendent of Police and Mayor were viewed by the Court as equivalent to the city ordinance in *Peterson. Robinson v. Florida,* 387 U.S. 153 (1967) involved racial segregation by a private entity pursuant to the requirements of a State regulatory agency. *Reitman v. Mulkey,* 387 U.S. 369 (1967) involved legislation enacted pursuant to a citizens' initiative which had the effect of expressly authorizing racial discrimination in housing, and which the California Supreme Court believed would significantly encourage and involve the State in private discrimination. *Evans v. Newton,* 382 U.S. 296 (1966), involved an attempt to perpetuate racial discrimination in a park which for years had been operated and maintained by the City of Macon, Georgia as trustee on a racially discriminatory basis, through the substitution of new trustees for the City.

In *District of Columbia v. Carter*, 409 U.S. 418 (1973), Justice Brennan reviewed on behalf of a unanimous Court the derivation of 42 U.S.C. § 1983 from Section 1 of the Ku Klux Klan Act of 1871[23]. In holding that 42 U.S.C. § 1983 does not apply to the District of Columbia, he emphasized that "[a]ny analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted" (409 U.S. at 425) and that the remedy created by this Section was "against those who representing a State in some capacity were unable or unwilling to enforce a State law" (409 U.S. at 426); *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961). The terms of the Act reflected an early expectation that a State might attempt to perpetuate racial discrimination in multiform ways—or by "statute, ordinance, regulation, custom or usage". The history of racial discrimination since the adoption of the Fourteenth and Fifteenth Amendments, and the almost infinite number of forms and devices resorted to in an attempt to perpetuate prior traditions of racial discrimination have borne out this expectation. It is in this context that the "sifting of facts and weighing of circumstances" approach has been employed by the Court to reach the substance, rather than the form, employed for that purpose, and, most important to this case, to ascertain whether there is a nexus between (a) the State's relationship to the private entity and (b) the act of the private entity to which the complaint is directed. Thus, even though *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) also involved racial discrimination, the Court found that there was no nexus between the granting by the State of a license to serve liquor and the practice of racial discrimination by the licensee. The Court pointed out that, with one exception, no Pennsylvania statute governing liquor licensing "either overtly or covertly" encouraged discrimination[24] and that, therefore, there was no State-commanded result. The Court also pointed out that the State's liquor licensing "is nothing approaching the symbi-

[23] Act of April 20, 1871, 17 Stat. 13

[24] 407 U.S. at 173.

otic relationship between the lessor and lessee that was present in Burton."[25]

There is a point at which verbal formulations to describe sophisticated attempts to achieve forbidden conduct run into difficulty. Formulations in terms of "state-commanded result", "symbiotic relationship", "significant involvement" of the State and the like are admirable in terms of their flexibility to reach and proscribe conduct, no matter how concealed or verbalized, which is contrary to the comprehensive protection of the Fourteenth Amendment. By the same token, such formulations should not be applied to acts which are privately initiated and executed and are neither fostered nor encouraged, let alone required, by "statute, ordinance, regulation, custom or usage".

By contrast with these cases involving discrimination on account of race, nothing in the Pennsylvania Constitution, statutes, or regulations commanded or approved action by Respondent to terminate electric service to a customer for non-payment of bills for service previously rendered to him. The Pennsylvania Constitution does not deal with the matter at all. Section 401 of the Pennsylvania Public Utility Law (66 P.S. § 1171) requires a public utility to "furnish and maintain adequate, efficient, safe and reasonable service" which shall "be reasonably continuous and without unreasonable interruptions or delays". That same section also provides in part that "subject to the provisions of this Act and the regulations or orders of the Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service."

The non-intervention of the State, and expressly of the Pennsylvania Public Utility Commission, in the discontinuance of service for non-payment of bills is reinforced by the provisions of subsection 202(d) of the Pennsylvania

[25] 407 U.S. at 175.

Public Utility Law (66 P.S. § 1122). That subsection provides:

> "Upon approval of the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful: ***
>
> "(d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any service, right, power, franchise, or privilege: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron."

Section 302 of the Pennsylvania Public Utility Law (66 P.S. § 1142) requires a public utility to file with the Commission within such time and in such form as the Commission may designate, tariffs showing all rates established by it and to keep copies of such tariffs open to public inspection. Sections 304 and 402 (66 P.S. §§ 1144 and 1172) prohibit a public utility, in respect of both rates and service, from granting any unreasonable preference or advantage to any person or from subjecting any person to any unreasonable prejudice or disadvantage. Thus, if Petitioner is correct in her contention that the termination of utility service to indigent customers subjects such customers, solely by reason of indigency, to unreasonable prejudice or disadvantage, the Commonwealth has not endorsed such action; on the contrary it has forbidden it.

Other sections of the Pennsylvania Public Utility Law give the Commission broad authority to regulate many aspects of Respondent's operations. For example, if the Commission finds that the service of a public utility is unreasonable or unreasonably discriminatory, the Commission is directed to prescribe, by regulation or order, reasonable and adequate service. (Section 413, 66 P.S. § 1183). It is also authorized to prescribe adequate and

reasonable standards, regulations and practices to be observed by public utilities. (Section 412, 66 P.S. § 1182). The Commission has general administrative power and authority to supervise all public utilities doing business within the Commonwealth (Section 901, 66 P.S. § 1341) and to enforce the Act by its regulations and orders (Section 902, 66 P.S. § 1342).

Up to this date, the Pennsylvania Commission has taken no action either to approve or disapprove explicitly Respondent's termination rule. Petitioner's brief explicitly confirms this in stating that the Pennsylvania Commission has specifically refused to promulgate additional rules and regulations regarding utility company collection and termination practices and dismissed, on March 20, 1974, the petition of several low income consumers (including that of Petitioner) to institute rule-making proceedings on that subject.[26]

The only action taken by the Commission thus far is reflected in its Tariff Regulation VIII, which provides:

> "Every public utility that imposes penalties upon its customers for failure to pay bills promptly, or allows its customers discounts for prompt payment of bills, shall provide in its posted and filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed or discounts are allowed. The tariff shall also indicate clearly whether, if bills are paid by mail, the date of the postmark will be considered the date of payment."

On its face this Tariff Regulation of the Commission does not appear necessarily to deal with terminations of service. Rather, it appears to deal with financial penalties (e.g. interest or penalty charges) for late payments and

[26] Pet. Br, 33. It is, of course, conceivable that such action by the Pennsylvania Commission may be subject to attack by Petitioner under 42 U.S.C. § 1983. But, if such an attack is to be made by her, it would be based on that action of the Pennsylvania Commission and not upon actions taken by Respondent.

discounts for prompt payments. But, even assuming that it embraces a penalty in the form of termination of service, the Regulation neither endorses nor disapproves of such termination.[27]

As the District Court noted:

> "However, the mere requirement that Metropolitan Edison clearly spell out any penalties it will impose for non-payment of bills does not clothe Metropolitan Edison with state authority nor transform the defendant's regulations into acts of the state. Rather, the purpose of Tariff Reg. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills". (App. 78)

Respondent's tariff provision relating to discontinuance of service provides, in pertinent part (App. 46):

> "(15)—*Cause for discontinuance of service:*
>
> Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; or, without notice, for abuse, fraud or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof."

Because the decision of the Court below (at App. 84) draws an inference—favorable to Respondent—concerning the genesis of this provision of Respondent's tariff which is not wholly correct, and because this inference, which is based on the silence of the record, has also been adopted

[27] During its current session—i.e., since the granting of the petition for certiorari—the Pennsylvania Legislature has amended the State's Public Utility law to prohibit the termination of electric service on Friday, Saturday or Sunday or on certain holidays. By not reaching the question before the Court, it does not affect the Petitioner's rules and regulations regarding the manner of termination and continues the State's policy of inaction in the area.

by Petitioner and amici, we deem it necessary to supplement the record in this respect. Court Exhibit No. 6 filed in the District Court consisted of the tariff sheets and supplements showing the provisions of Respondent's Tariff No. 40 relating to residential electric service which were in effect during the period January 1, 1970 to and including June 29, 1971. Court Exhibit No. 7 was Respondent's Electric Tariff No. 41 showing the provisions of such Tariff relating to residential electric service as they were in effect subsequent to June 30, 1971. Respondent's Electric Tariff No. 41 and Supplement No. 1 thereto were filed by Respondent with the Pennsylvania Public Utility Commission on April 30, 1971. The primary purpose of filing Electric Tariff No. 41 was to provide for a proposed annual rate increase of approximately $12,600,000 and of Supplement No. 1 thereto was to provide for a further increase of approximately $10,000,000. However, in accordance with the general practice of public utilities in Pennsylvania designed to prevent tariffs from becoming unduly cumbersome with numerous supplements and provisions, Respondent included in Electric Tariff No. 41 not only its new rates but also all of its pre-existing general rules and regulations (App. 38-63) including its Regulation No. 15 to which Petitioner's complaint is directed. This Regulation 15 had been in effect as part of Respondent's prior tariffs.

By Commission Order of June 28, 1971, the Pennsylvania Commission suspended for six months the operation of the Supplement (thereby precluding the additional $10,000,000 increase provided for in the Supplement), but it did not suspend Electric Tariff No. 41 itself and the $12,600,000 increase therein provided for was permitted to become effective June 30, 1971. However, by a concurrent order dated June 28, 1971, the Commission instituted an investigation for the purpose of determining the fairness, reasonableness, justness and lawfulness of the rates, charges, rules and regulations proposed in Tariff No. 41 and Supplement thereto.

Various complaints with respect to Electric Tariff No. 41 and Supplement thereto were filed but no complaint was directed at Regulation No. 15. Hearings were held during the period September 30, 1971 to March 10, 1972, oral argument held before the Commission and the Commission decision was rendered on August 8, 1972. No issue was presented in the proceeding with respect to Respondent's Regulation No. 15, no testimony with respect thereto was presented and no finding made thereon.

In its August 8, 1972 order, the Commission authorized increased rates aggregating approximately 76% of the total increase proposed in Electric Tariff No. 41 and the Supplement. It did not direct any changes in any of Respondent's rules or regulations. It directed Respondent to file, effective for service rendered on or after the date of the order, a further supplement containing acceptable rates to provide total annual revenues at the rate allowed by its order, together with supporting calculations, and Respondent did so promptly thereafter.

It is Respondent's view that such action by the Commission does not constitute State action by the Commission or any other agency of the State with respect to the matters which are the subject of this proceeding, but we have set forth this information in order to clarify the record on this score.

It is Respondent's view that, far from there being State action in the case before the Court, there has been consistent State inaction. Unlike Respondent's charges for service, Respondent's Regulation regarding termination, though contained in Respondent's tariff, has never been specifically approved by the Pennsylvania Public Utility Commission.[28]

[28] *Cf. Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952) where the Commission specifically approved the action complained of.

F. *The fact that Respondent's revenues are subject to taxation by the State and local subdivisions thereof does not bring Respondent's actions within the ambit of the Fourteenth Amendment.*

In *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir.), vacated as moot, 409 U.S. 815 (1972), the Eighth Circuit based a finding of State action on the fact that the City which regulated the utility also received 5% of the utility's gross earnings. The Court below in this case appeared to distinguish Respondent's situation from that involved in *Ihrke*, without making clear its basis for such distinction (App. 86). If the holding in *Ihrke* is correct, Respondent shares with Petitioner the view that Respondent's situation is indistinguishable. Respondent pays gross receipts tax to the Commonwealth [29] which, through the Pennsylvania Public Utility Commission, also regulates Respondent.

Respondent believes that argument thus adopted by the Eighth Circuit in *Ihrke* is wrong. It proves too much. By that test, any private entity which pays any tax on gross receipts or net income and whose receipts or earnings are enhanced by the act complained of would be deemed to be acting for the State for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983. Just as the receipt of State-furnished services does not "emasculate the distinction between private as distinguished from State conduct", *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972), so the payment of general taxes does not emasculate that distinction.

G. *Since Respondent did not employ facilities or authority of the Commonwealth to effect the termination of service, the manner of such termination is not central to a finding that the termination did not involve action under color of State law.*

The Court below laid stress on the fact the termination was effected by Respondent without entry on Petitioner's

[29] Respondent also pays a separate gross receipts tax to the City of York, Pennsylvania, where Petitioner resides.

premises (App. 84). Although this was the fact in this case, Respondent submits that the result should have been the same if this termination had been effected on Petitioner's premises. Most electric utility terminations are effected on the customer's premises at the meter. The record is silent concerning the reason for effecting this particular termination at Respondent's pole and not on Petitioner's premises.

Respondent's terminations of service are a matter of self-help effected in accordance with its own regulations (App. 44-45); the grant of authority by its customers to Respondent of access to such premises is one of the "conditions under which service is rendered" (App. 38). Although Petitioner asserts that such access is dependent upon a grant of authority from the Pennsylvania Public Utility Commission in the latter's Rule 14D (reproduced at Pet. Br. App. A. at 13a), an examination of that Rule demonstrates that it relates to access "for purposes of maintenance and operation." Respondent does not rely upon this Rule of the Commission for access to a customer's premises for termination. It relies on the terms of its own Regulations which are, as noted, a condition of its undertaking to supply service.

Termination of service by a utility with its own personnel pursuant to its agreement with its customer thus stands on a different footing than the use of State officials under a writ of replevin as presented in *Fuentes v. Shevin*, 407 U.S. 67 (1972). In that case, creditors caused a State official to act. In this instance no State personnel are involved.

H. *The practical consequence of acceptance of Petitioner's position would be to deprive Respondent of property without due process of law in violation of the Fifth Amendment.*

As set forth above, the claim that Petitioner is disputing any bill is attenuated at best. But, assuming the existence of a genuine dispute, Petitioner's claim is that she

may use the Federal courts to compel Respondent to spend its funds and property to provide service to her without payment or assurance of payment.

Petitioner and amici lay great stress on some instances of hardship suffered by consumers, but they apparently pay no attention to the heavy burden on utilities their investors and the general public caused by delinquency in payments by customers and the encouragement to such delinquency caused by an inflexible requirement for hearing prior to termination. In *Palmer v. Columbia Gas of Ohio, Inc.*, 342 F. Supp. 241 (N.D. Ohio W.D. 1972), *aff'd*, 479 F.2d 153 (6th Cir. 1973), particularly relied upon by Petitioner, the Federal District Court found that the utility there involved, which served a total of 140,000 customers, annually mailed out 120,000 to 140,000 notices of proposed termination, but actually discontinued service in only 6,000 instances. It has been reported that some electric utilities have as many as one-third of their total customer accounts in arrears, and that this has been a significant factor in the financial crisis suffered by Consolidated Edison Company of New York, Inc.[30]

An inflexible requirement for a prior hearing before an impartial hearing officer (with or without appointment of counsel) would not only greatly add to the administrative burden in conducting utility operations, but would greatly increase the delinquency rate and the losses suffered by utilities. The proposed termination procedures set forth by amicus curiae, National Consumer Law Center, Inc., and the commentator in *"Fourteenth Amendment Due Process in Terminations of Utility Service for Non-payment"* appear to ignore this aspect and assume that these costs will in some unspecified fashion be borne by a willing general public. If so, their appeal should be to the Legislature and not to the Federal Courts. It may well be that these social policies they urge will be best achieved by

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[30] New York *Daily News*, May 22, 1974, page 30.

[31] 86 Harv. L. Rev. 1477, 1494 (1973).

revised welfare procedures in which welfare agencies would provide funding for disputed utility bills.

In the interim, one cannot assume that utilities can recover these costs. They do not have the taxing powers available to reimburse themselves for losses suffered and, in that respect, are in a different posture from the government which can be reimbursed through the exercise of taxing powers for payments made to unqualified welfare recipients. *Goldberg v. Kelly*, 395 U.S. 254 (1970). As previously stated, Respondent and many other utilities have in fact been unable for some time to earn the fair return which is the purported standard of rate regulation. The granting of Petitioner's complaint would accentuate this problem and produce a result in which an attempt to insist on "due process" hearings before any utility termination deprived a great many of substantial property rights in order to protect potential property rights of a few. Due process requires a better balancing of competing interests and a recognition that not all problems of our society can be thrust upon the courts.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that this Court affirm the action of the Court below.

Respectfully submitted,

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May 28, 1974